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TRICHOTOMY IN ROMAN LAW

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IN ENGLAND AND WALES"

THIS LITTLE BOOK IS DEDICATED

BY THE AUTHOR

IN GRATEFUL RECOGNITION OF THE

HONOUR CONFERRED ON HIM BY HIS ELECTION AS

FIRST PRESIDENT OF THE SOCIETY

1908–10

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PREFACE

Some years ago I contributed an article to a *Festschrift* in honour of Professor Carlo Fadda of Naples, in which I examined the classifications of obligations in Justinian's Institutes, and I endeavoured to show that the peculiar divisions into groups of four that we there meet with may be traced to a desire for artificial symmetry on the part of the Editors, and were neither based on any considerations of logic nor the result of mere coincidence. This article was published in the *Studi Fadda* in 1906 under the title 'Artificiality in Roman Juristic Classifications', and its conclusions, though not generally accepted, have been received with favour by some eminent Romanists who have been good enough to write to me about it. In that article I stated that I was of opinion that many of the Roman lawyers were influenced by the symbolism of numbers, as regards both the external arrangement of their works and the classifications of the subject-matter contained in them, though I did not attribute the

particular fourfold classifications in the Institutes to symbolism but rather to a desire for artificial symmetry. I also said (*Studi Fadda* V, p. 212) that I should at a future date, if possible, comment on the symbolic influence of the number 3. The present monograph is the fulfilment of that undertaking.

For the views expressed in the following pages I am solely responsible, but I desire to express here my thanks to my friends Professor Cook Wilson, Mr. Warde Fowler, Fellow of Lincoln College, and Emeritus Professor Strong, of Liverpool University, for some valuable suggestions to which I have given effect. To Professor Cook Wilson in particular, who read over the whole of the proof prints of the work and made a number of acute criticisms, I am much indebted.

All Souls College,
Oxford, 1910.

UNIV. OF CALIFORNIA

TRICHOTOMY IN ROMAN LAW

In modern times, at any rate among European nations, one does not attach any particular significance to numbers as such, outside the realm of mathematics. One does not at all regard them as influencing actions or events either in public or private life. Least of all have modern writers, if we except perhaps Hegel, been consciously influenced by them in the composition of their writings.[1] What literary or scientific author nowadays, in dividing his treatise into parts, books, &c., or dividing his subject-matter into heads and categories or genera and species, would attach any special importance to what the number of these might be? But in former times it was different: to the ancients certain numbers had a mystical value or fixed traditional force, and ancient writers frequently made the distributions of their subject-matter, as well as the external

[1] But see Hofmann, *Zeitschr. für Rechtsgeschichte*, xi, p. 344, n.[30]. Hegel's triads however are not properly classifications of genera into co-ordinate species, but rather a consequence of his method of philosophy.

arrangement of their works, depend upon their accordance with one or other of these numbers. The influence of this symbolism, or whatever it be called, can be demonstrated to have existed, in greater or less degree, among all ancient nations with whose culture we are acquainted, especially the Hindus, Hebrews, Egyptians, Greeks, and Romans.[1] The numbers 3, 4, 7, and 12 seem to have been above all sacred, but 9 and 10 were also universally symbolic. By the vulgar they were generally regarded as lucky numbers, while philosophers sought a rational basis for them. It is in the last degree improbable, for instance, that the Commandments given to Moses would ever have been published as, say, eight or eleven, or the decemviral code of the Romans in, say, thirteen tables.[2] How far this mysticism of numbers continued to affect mediaeval writers or left its impress on mediaeval institutions it is not my purpose to inquire. That it still continued to exercise a certain,

[1] See Usener, *'Dreiheit,' Rhein. Mus. f. Philol.* (N. F.), lviii, pp. 82 sq. The Celtic races also showed great partiality for them. See K. Meyer, as in p. 7, n.[1] *infra* and p. 9, n.[3].

[2] Ausonius describes the law of the XII Tables as—

> Ius triplex, tabulae quod ter sanxere quaternae,
> Sacrum, privatum, et populi commune quod usquam est.
>
> *Edyll.* xi, line 61.

though gradually decaying, influence is undoubted. On this point it will suffice to quote a passage from our own Lord Coke, a dry but not wholly unimaginative writer. Speaking of the English jury, he says, 'It seemeth to me that the Law in this case delighteth herself in the number of twelve. For there must be not only 12 jurors for the trial of matters of fact, but 12 judges of ancient time for trial of matters of law in the Exchequer Chamber. . . . And that number of twelve is much respected in Holy Writ as 12 Apostles, 12 stones, 12 Tribes, etc.'[1]

The Pythagorean school of philosophy was apparently the earliest to propound a system of symbolic numbers. Possibly they may have borrowed it from India, for, at all times in the philosophy and religion of the Hindus, such symbolism has been prominent. The Pythagorean views on the subject influenced Plato, as we see from the *Timaeus*,[2] and had an un-

[1] *Institutes*, Part I, lib. 2, cap. xii § 234. The Ancient Laws of Ireland, among others, afford unmistakable evidence of symbolic numbers, a whole book being composed in heptads. See vol. v, pp. 117 sq. of *Ancient Laws of Ireland*, Dublin, 1901, and K. Meyer, *The Triads of Ireland*, in Todd Lecture Series of Royal Irish Academy (1906), p. xii.

[2] See trans. by Jowett, pp. 463, 468, 474, &c.; Proclus,

doubted influence on Greek mythology. Perhaps strongest of all was the influence exercised upon the Neo-Platonists. The conquests of Alexander brought the Greeks into direct touch with the religion and philosophy of the East and affected powerfully, it is thought, the speculations of the later Greek Schools.

It is not my purpose, and this is not the place, to enter upon a discussion of theories regarding the origin and meaning of the symbolic numbers above mentioned. My concern is with the number 3. That a special mystical value was attached by ancient writers to this number is of course familiar to scholars.[1] To quote what I said in the *Festschrift* for Carlo Fadda, referred to above in my Preface: 'To many of the leading nations of antiquity it represented divine power. As evi-

Commentary on *Tim.* iii. 181; cf. Plato, *Legg.* x. 888 E. Aristotle seems on the whole free from the same charge. But see *De Caelo*, i. 1 init. 268 a, where he discusses the completeness of the number 3 with reference to the line, plane, and solid in magnitude, and *Rhet.* i. 2, 3.

[1] For an explanation of the origin of the mystic value of the number 3 see Diels, *Archiv f. Gesch. d. Philos.*, x, pp. 232–3; Usener, *op. cit.*, pp. 348–62. They trace it back to the earliest periods in the history of races, when 3 was the highest number that could be reckoned and signified many. Tylor, *Primitive Culture*, i, p. 220. *Tribus*, meaning a community, may perhaps be taken as an example of this.

dence of this it is enough to refer to the three Gods of Hindu mythology—Vishnu, Siva, and Brahma,[1] and the Trinity of Christian doctrine. By some ancient philosophers, again, it was regarded as the most symbolic of numbers, because it represented the beginning, middle, and end of all things, and also the dimensions of space.'[2] To this may be added that among the Welsh and Irish the influence of the number 3 was unbounded. The name *triad* was given in these countries to a species of literary composition in which the subject-matter was arranged in groups of three. K. Meyer observes, 'I am not aware that this kind of composition has ever attained the same popularity elsewhere as in Wales and Ireland, where the manufacture of triads seems at times almost to have become a sport.'[3] He also gives one or two curious illustrations of modern triads, said to have been in current use among the

[1] And the three goddesses—Doorga, Lakshmi, and Sarasvati. Egyptian triads (e. g. Amon, Mut, and Khonsu) were also very common. See Maspero, *Études de Mythologie Égyptiennes*, vol. ii, pp. 386 sq.

[2] *Studi Fadda*, v, p. 210. See Usener, '*Dreiheit*,' *Rhein. Mus. f. Philologie* (N. F.), lviii. 1, pp. 31 sq.; Lobeck, *Aglaophamus*, pp. 384–9. For the further conception of trinity in unity see Usener, *l. c.*; cf. Martial, *Ep.* v. 24—'Hermes omnia solus, et ter unus.'

[3] Todd Lecture Series, p. xv, cited *supra*.

common people within living memory. The two following are amusing and may be quoted:

'Three disagreeable things at home: a scolding wife, a squalling child, and a smoky chimney.'[1]

'The three finest sights in the world: a field of ripe wheat, a ship in full sail, and the wife of a MacDonnell with child.'

But at any rate it is certain that among the Romans from the earliest times the number 3 was by far the most significant.[3] As an odd

[1] With this compare the old German couplet—

'Drei ding im haus sind ungelegen:
der rauch, ein bös weib und der regen.'

[2] Ibid. p. ix. 'In England and Germany, also, as stated by me in the *Studi Fadda*, relics of the old superstition about the number 3 still linger. Thus in England one says—'the third time is the lucky one', and in Germany there are proverbs—'aller guten Ding sollen drei sein' and 'dreimal ist Bubenrecht'. For other instances of the symbolism of the number in Germany see Grimm, *Dict.* v. 'Drei'.

[3] The symbolism of the numbers 4 and 7 may just be noticed. The Pythagoreans regarded the 4 (the τετρακτύς) as the perfect number, the root of all nature and ground of all things. See Themist. *Phys.*, lib. iii, and other references in Roby, *Introd. to Digest*, p. xxix. Its importance in Holy Writ is also well known and needs no illustration. Not less symbolic was the number 7 (probably due to its being, as Philo says, a combination of 3+4, or, as some hold, 3+1+3, and not, as more commonly supposed, based on astrological reasons, just as the symbolism of the 9 and 12 may be due to their being 3×3 and 3×4 respectively). Thus in Holy Writ the whole book of Revelation is domi-

number it enjoyed of course the good omen which the Romans attached to such numbers—'numero deus impare gaudet'.[1] But the evidence of its influence meets us on every hand. The Roman mythology presents it to us unmistakably.[2] Thus we have the Capitoline triad of

nated by the number 7 — 7 churches, spirits, golden candlesticks, &c.—while elsewhere we are given 7 days of the week and endless other examples. (See e.g. Ezekiel xlv. 23-5.) Among the Greeks the 7 was sacred to Apollo and Dionysus. Among the Romans we have also clear evidence of its influence, as in the 7 kings, hills, seals of testaments, &c.; see Aulus Gellius, *N. A.* iii. 10, 17; Apuleius, *Metamorph.* xi (238). Justinian himself, in his introduction to the *Digest* (*Tanta*, § 1), tells us that he made the division of that work into 7 parts 'non perperam neque sine ratione sed in numerorum naturam et artem respicientes'. Consult especially Smith, *Dict. of Bible*, voce *seven*; Hofmann, *Z. für Rechtsgeschichte*, pp. 343 sq.; Hadley, *Essays Philological and Critical*, pp. 325 sq. See also on the symbolism of the numbers 7 and 9 in Greek mythology, Roscher, 'Sieben und Neunzahl' in *Abhand. d. König. Sächs. G. d. W.* (1904).

[1] See Virg. *Eclog.* viii. 78–77. Numa's supposed enactment regarding the Calendar is given by Macrobius thus—'Numa in honorem imparis, numeri adjecit diem'. See also Censorinus, *d. d. Nat.* xx. 4. Cf. Plato, *Laws*, iv. 717.

[2] Similarly among the Greeks. According to Usener's reckoning, the Theogony of Hesiod contains fifteen triads of Gods and lesser divinities; see *Rhein. Mus. f. Philologie* (N. F.), lviii. 1, p. 4. Τριτογένεια was a name for Athene and Τρισμέγιστος for Hermes. For the influence of the number 3 in the cult of mysteries, see Hildebrand's *Prolegomena* to his edition of Apuleius, *Metamorph.*, p. xxxvii.

Jupiter, Juno, and Minerva, the three Furiae, the three Parcae, the three Gratiae, and others[1]—most of them originally borrowed from the Greeks, but some of them native. But every department of Roman life, secular as well as sacred, private as well as public, was profoundly affected by it. In the singular poem of Ausonius, '*Griphus* ternarii numeri,'[2] he has given, following in the steps of earlier writers from Pythagoras downwards, an immense number of instances of all kinds from which the nature and force of the number 3 among the Romans can be readily appreciated.

In short, the number 3 seems to have represented to the Romans periodicity, and hence by a natural transition completeness: it was to them the perfect number — *Tres numerus super omnia.*[3] The traditional origin of the Romans

[1] The Capitoline triad, as such, seems to have been Graeco-Etruscan. Another notable triad was Ceres, Liber, Libera; corresponding to Demeter, Dionysus, Persephone. On the three Graces, see Seneca, *de Beneficiis*, i. 3. 3. He discusses why the number should be three as held by the Stoics (instead of two, as some held), and explains that they corresponded to the tria beneficiorum genera, viz. 'promerentium, reddentium, simul accipientium reddentiumque.' Cf. note by Bouillet in Lemaire's ed.

[2] Ausonius, *Edyllia* xi.

[3] Ausonius, *Edyll.* xi, l. 88; cf. ibid., l. 52.

from 3 races (Ramnes, Tities, and Luceres) and the consequent political division of the early people into *tres tribus* is a noticeable instance.[1]

Evidence of the early symbolism of the number is also clearly shown in the XII Tables. One of the most remarkable provisions of the decemviral code is expressed thus: 'Si pater filium *ter* venumduuit, filius a patre liber esto.'[2] This means that if a *paterfamilias* sells his son three times his *potestas* over the son shall end. So fundamental was the power of a father over his son conceived to be—involving the notion of *imperium* as well as *dominium*—that the sale of the son to another person only suspended and did not destroy it. If such son were afterwards manumitted by the purchaser he fell back into *patria potestas*. Were he sold a second time and again manumitted, the result was the same. But if sold a third time the *potestas* was regarded as extinguished and, if now manumitted, the son became *sui juris*.[3] Another rule of the XII

[1] It also appears in the *tripudium* of the *Carmen Arvale*. On this see Warde Fowler in *Classical Review*, xvi, p. 211.

[2] *Tab.* iv. 2 (Schoell).

[3] Whether this rule was first laid down by the Decemvirs or was due to earlier custom it is impossible to say. Gaius (iv § 79) speaks of it as if introduced by the Decemvirs for purposes of emancipation and adoption, but these applica-

Tables was the so-called *usurpatio trinoctialis*.[1] 'Lege XII Tab. cautum erat,' says Gaius, 'si qua nollet eo modo [usu] in manum mariti convenire, ut quotannis *trinoctio* abesset atque ita usum cuiusque anni interrumperet.'[2] That is to say, a wife who remained away from her husband's abode for three consecutive nights in each year prevented *manus* being acquired over her by prescription.[3] Another law of the XII Tables, illustrative of my point, was that relating to a judgement debtor arrested by *manus injectio* of his creditor. He had to be kept for 60 days in prison by the creditor, and produced during that period on three successive *nundinae* (*ternis nundinis*) before the praetor in the market-place. At the close of the third *nundinae*, failing settlement of the debt or intervention of a *vindex*, he was addicted to the creditor who might do what

tions of it seem rather due to *interpretatio*, and it is more probable that it was originally intended to relieve sons from the hardship of being repeatedly sold for a price, or pledged by their *patresfamilias*. For another view see Girard, *Manuel d. d. r.*, p. 183.

[1] *Tab.* vi. 4 (Schoell).

[2] Gai. i § 111 ; cf. Gellius, iii. 2. 18.

[3] As the law speaks of *trinoctium* (and not *triduum*) it may be presumed that the wife might spend the day at the domestic hearth and attend to her duties, provided that she absented herself during the night.

he liked with him.[1] Another illustrative law of the Tables was in these words: 'Cui testimonium defuerit, is *tertiis* diebus ob portum obvagulatum ito.'[2] Of this law various explanations have been given, of which one is that it refers to a plaintiff, in an action calling aloud upon his debtor outside the latter's house, to perform his obligation. If this were done for three consecutive days the recalcitrant or impecunious debtor (against whom ordinary *in jus vocatio* could not be made) could then be arrested by *manus injectio* even within the house itself.[3] Besides the instances just mentioned there are others in the XII Tables in which the number 3 figures.[4] In

[1] *Tab.* iii. 5. Also 'tertiis nundinis partis secanto' in iii. 6; cf. Gellius, xx. 1. 49.

[2] *Tab.* ii. 3; Festus, s. v. *vagulatio* (ed. Mueller), p. 375.

[3] See Voigt, *XII Tafeln*, i, p. 535. If this be right, the *Dharna* of Hindu law offers an interesting analogy. Puchta, however (*Inst.* § 160 a), and others think the *obvagulatum* relates to a recalcitrant witness who, after the third day, might be seized by *manus injectio*.

[4] e. g. the *dies comperendinus*, the three kinds of delict, and the three forms of personal injury. It has been held by some writers that, prior to Justinian, three adjudications in separate *liberales causae* were required to fix the status of slavery on an alleged freeman. Such a rule may have been in the XII Tables, but the evidence on the subject is obscure and does not warrant the conclusion that there were then actually three actions; see *Cod.* vii. 17. 1 pr.; Buckland, *Law of Slavery*, p. 668.

later times and among the classical jurists the notion of completeness or perfection involved in it is signified by numerous phrases, rules, and maxims. Such are, for example, the *jus trium liberorum*, *tria onera tutelarum dant excusationem*, the *tria verba* (*do*, *dico*, *addico*), *tres faciunt collegium*, the *ex tribus maribus* of the Senatusconsult Afinianum (or Sabinianum ?).

That Roman writers—literary, philosophic, and juristic—were alike profoundly influenced by the *ternarius numerus*, as indeed they were by other symbolic numbers, in the external arrangement and composition of their works, cannot be doubted. It has been frequently pointed out.[1] It continued down to Justinian, and even to mediaeval times, as already indicated. Thus Justinian, in his constitution 'Tanta', says: 'Omni igitur Romani juris dispositione composita, et in tribus voluminibus, id est Institutionum, et Digestorum seu Pandectarum, necnon Constitutionum perfecta, et in tribus annis consummata.'[2] That a similar

[1] See Roby, *Introd. to Digest*, pp. xxix–xxx; Hofmann, *Zeitschrift für R. G.* xi, pp. 340 sq., and xii, pp. 180 sq. Hofmann calls it 'Zahlenspielerei'. He gives reasons for thinking that Justinian's partiality for mystic numbers was influenced by the Neo-Pythagorean philosophy.

[2] *Tanta*, § 12; cf. § 23, and *Omnem reipublicae*, § 7. As to what he says about the number seven see *supra*, p. 10, n.[3].

influence affected the treatment of their subject-matter, particularly their divisions and classifications, is to my mind equally clear, and it is this that I will attempt to prove, from juristic texts, in the following pages. This influence frequently led the jurists, or at least some of them, to sacrifice logic and proportion in dealing with legal topics, and thereby to produce unsatisfactory and sometimes even misleading doctrines. As I have elsewhere said, 'Almost necessarily classifications influence the treatment of subject-matter, and, if they are bad, the result is that subjects are placed in juxtaposition that are not truly co-ordinate, worthless distinctions are produced, and otherwise the legal system is injuriously affected.'[1]

This influence of the *ternarius numerus* is best illustrated from the Institutional treatises of the jurists, as it is in them we naturally look for classifications and categories, but it appears in all their writings. Most of the jurists are, more or less, chargeable with it, but with Ulpian, infected as he was, apparently, by Stoic philosophy, it is

On the possible symbolism of the mediaeval division of the *Digest* into three parts (*vetus, infortiatum, novum*), see Puchta, *Inst.* i, pp. 644 sq.

[1] *Studi Fadda*, v, p. 209.

specially remarkable. It is perhaps not too much to say that wherever Ulpian gives a classification of an institution or doctrine into *genera* or *species* we may expect to find it tripartite, if the subject-matter admits of it or can be forced into it.[1]

Keeping in view, then, the symbolism of perfection attached by the Romans to the number 3, illustrations may now be given of how it influenced the jurists in their classifications. By the term 'classification' I mean a division of the matters or topics, which constitute any doctrine or institution, into classes that should be mutually exclusive or, in other words, a division into *genera* and *species*; it does not apply to mere varieties or forms included in a species, which are of course generally indeterminate and may be infinite.[2] These latter, being incapable of classification, are generally introduced by such words as *velut* (*veluti*), *sicut* (*sicuti*), *ut*, *utputa*, *quorum in numero*, or the like, though no doubt some of these words were also

[1] The same charge may be to a large extent made against Paul, who, if we may judge from his writings, was a Stoic of the Stoics. But, strictly speaking, the charges, as we shall see, are rather to be made against the earlier writers from whom Paul and Ulpian drew.

[2] Distinctions however, in jurisprudence, between species and varieties are often as arbitrary and difficult to be made as in the field of natural science. See, as to the latter, *Life and Letters of Charles Darwin*, ii. 88.

occasionally used where an exhaustive enumeration was intended.[1]

The partiality of the Roman jurists for the tripartite classification[2] has not been unobserved by modern writers,[3] but, so far as I know, no one has sought for a reason for it or attempted to give any explanation of it.

I shall now arrange in juxtaposition some leading tripartite classifications, confining myself to the primary divisions of law and the topics dealt with in the first books of the Institutes of Gaius and Justinian and the cognate texts in the Rules

[1] See Gai. i § 120, and iii § 141; Cohn, *Beiträge*, Heft 2, p. 45. On partition and division of *genera* see Cicero, *Top.* §§ 30–4. The jurists unfortunately use the terms *genera* and *species* without precision, e. g. *species* of obligations and *genera* of contracts in Gai. iii § 88. Cf. *Inst.* iii. 13 § 2. We get *genera* instead of *species furtorum* in *Inst.* iv. 1 § 3. Cf. Gai. iii §§ 182–3.

[2] *Tripertitus* (or *tripartitus*), formed from the numeral and *pars* (*partior*), is quite classical (Cicero, *de Off.* iii. 2. 9; *Top.* 90). As is well known, the earliest treatise on Roman law, of which there is any distinct record, was the so-called *Tripertita* of Sextus Aelius, a work said by Pomponius (*Dig.* i. 1, 2 § 38) to have been composed of three parts, which he describes as harmonizing with his own threefold division of the sources of the law (Ibid. § 6). Besides *tripertitus* there are numerous other Latin words meaning threefold, similarly formed by composition with the numeral *tres*, as *triplex, ternarius, trifarius, triplasius, triplus, triplaris.*

[3] See Savigny, *System*, i, p. 395; Mommsen, *Röm. S.-R.* iii. 1, p. 8 n.

of Ulpian and in the Digest; afterwards I shall comment upon each of them separately. It will be observed that the great majority of these classifications are given by Ulpian; several of them are given by him alone.

1. The precepts of law are—*honeste vivere, alterum non laedere, suum cuique tribuere.*[1]

2. Public law consists—*in sacris, in sacerdotibus, in magistratibus.*[2]

3. Private law is composed of *jus naturale, jus gentium,* and *jus civile.*[3]

4. All law was either made by consent, or established by necessity, or settled by custom.[4]

5. Praetorian law was introduced by the praetors for the purpose either of assisting, or supplying deficiencies in, or correcting the rigour of the *jus civile,* in the public interest.[5]

6. Constitutions of the emperors, as a source of private law, are *decreto vel edicto vel epistula.*[6]

7. The subject-matter of private law relates either to persons, or to things, or to actions.[7]

[1] Ulpian in *Libro primo Regularum, Dig.* i. 1, 10 § 1; *Inst.* i. 1 § 3. [2] Ulp. in Lib. i *Institutionum, Dig.* i. 1, 1 § 2.
[3] Ulp. in Lib. i *Instit., Dig.* i. 1, 1 § 2; *Inst.* i. 1 § 4.
[4] Modestine in Lib. i *Reg., Dig.* i. 3, 40.
[5] Papinian in Lib. ii *Definitionum, Dig.* i. 1, 7.
[6] Gai. i § 5; Ulp. in Lib. i *Inst., Dig.* i. 4, 1 § 1; *Inst.* i. 2 § 6. [7] Gai. i § 8; *Inst.* i. 3 pr.

8. All law is concerned with either the acquisition, or conservation, or restriction of rights.[1]

9. Persons are grouped into (1) *liberi* and *servi*, (2) *cives*, *latini*, and *peregrini*, and (3) *sui juris* and *alieni juris*.[2]

10. Persons are divided into *liberi*, *servi*, and *libertini*.[3]

11. Freedmen are divided into *cives*, *latini*, and *dediticiorum numero*.[4]

12. The conditions upon which slaves might acquire *civitas* are three, and the modes of manumission under *jus civile* are also three, viz. *vindicta*, *censu*, and *testamento*.[5]

13. Persons *alieni juris* are either *in potestate*, *in manu*, or *in mancipio*.[6]

14. Marriages under *jus civile* are contracted *farreo*, *coemptione* and *usu*.[7]

15. Emancipation and adoption of *filiifamilias*

[1] Ulp. in Lib. ii *Inst.*, *Dig.* i. 3, 41.

[2] Gai. i §§ 9, 12, 48.

[3] *Inst.* i. 5 pr.; Ulpian in Lib. i *Institutionum*, *Dig.* i. 1, 4.

[4] Gai. i § 12; Ulp. *Reg.* i § 5; cf. *Inst.* i. 5 § 3.

[5] Gai. i § 17; Ulp. *Reg.* i § 6.

[6] Gai. i § 49; Ulp. *Reg.* xix § 18.

[7] Gai. i § 110. Ulpian doubtless gave this also in *Reg.* ix, but the MS. is here defective. It was also contained in his *Institutes* as cited by Boethius in *Topica*, 3, 4; see Girard, *Textes*, p. 467.

is effected by three mancipations and three manumissions.[1]

16. Of persons *sui juris* it is said: 'quaedam vel in tutela sunt vel in curatione, quaedam neutro jure tenentur.'[2]

17. Tutors are divided into 'legitimi aut senatus consultis constituti aut moribus introducti'.[3]

18. *Status* consists of *libertas*, *civitas*, *familia*.[4]

19. *Capitis deminutio* is divided into *maxima*, *media*, and *minima*.[5]

The above nineteen divisions form the large majority of the leading classifications of the subject-matter dealt with in the first books of the *Institutes* of Gaius and Justinian or cognate thereto.[6] I have so put them together for the sake of a clear conspectus.

[1] Gai. i § 132; Ulp. *Reg.* x § 1. Neither Gaius nor Justinian give the modes of creating *patria potestas* formally; but as described by them in their *Institutes* there were just three modes, viz. birth in lawful marriage, adoption, and legitimation—the last of these having of course a widely different import with Gaius from what it had with Justinian.

[2] Gai. i § 142; *Inst.* i. 13 pr. It seems clear that a tripartite division was here intended.

[3] Ulp. *Reg.* xi § 2; cf. Ulp. in *Dig.* xxvi. 1, 6 § 2. Neither Gaius nor Justinian give formally any division, but see *infra*, p. 47, n.[2].

[4] Paul in *Dig.* iv. 5, 11.

[5] Gai. i § 159; Ulp. *Reg.* xi § 10; *Inst.* i. 16 pr.; Paul in *Dig.* iv. 5, 11.

[6] There are no doubt a considerable number of classifica-

It would, of course, be rash to predicate that all of them are due to the mystic influence of the number 3, but I cannot resist the conclusion that the great majority of them are due to that cause. They are mostly, if not altogether, traditional. A critical examination of them, which I now proceed to make, will show that with few exceptions they are neither logical nor suitable to the treatment of the topics that they severally represent.

tions to be found in the *Institutes* both of Gaius and of Justinian that are not tripartite. The influence of the *ternarius numerus* in fact in these works, apart from traditional classifications, is not so marked as it is in the writings of Ulpian, and possibly neither Gaius nor Justinian's editors were consciously affected by it. Gaius's fundamental division of law into *jus gentium* and *jus civile* is noticed below (p. 27). Another primary division of law into *jus publicum* and *jus privatum* (perhaps taken originally from Aristotle, *Rhet.* i. 13. 2—λέγω δὲ νόμον τὸν μὲν ἴδιον τὸν δὲ κοινόν—) is also noted below (p. 25). Another dual division into *jus scriptum* and *jus non scriptum* was, as Ulpian indicates (*Dig.* i. 1, fr. 6 and *Inst.* i. 2 § 3), taken from the Greeks and perhaps from Aristotle (*Rhet.* i. 13. 2). See Schrader, *Commentary on the Institutes, hoc loco.* Gaius further makes logical twofold divisions of men into *liberi et servi* and of freemen into *ingenui et libertini*, while Ulpian, as above noted, has a trichotomy (see *infra*, p. 39, n.[2]). Of adoption it is said by Gaius, i § 98, 'duobus modis fit', while Ulpian, *Reg.* viii. 2, describes it as created 'aut per populum aut per praetorem vel praesidem provinciae', where, though the contrast of *aut* and *vel* shows perhaps that he does not intend a tripartite division, he seems almost as if constrained by his usual habit.

1. The *praecepta juris* are said to be three—*honeste vivere, alterum non laedere, suum cuique tribuere.* That this text was originally borrowed from some writer on philosophy can hardly be doubted. It was familiar to the Greeks.[1] It is obvious that none of the three precepts is a rule of positive law. To live honestly, for instance, is a good moral maxim, but the law does not insist on it. The police constable is not called upon till the dishonesty or immorality discloses itself in the infraction of some rule prescribed by the law of the land. 'Non omne quod licet honestum est,' says Paulus.[2] The other two precepts are open to similar criticism. The second would seem to be logically included in the third. Or the *honeste vivere*, if it is to be taken in a wide sense as including both negative and positive duties, would alone have sufficiently included the other two.[3]

[1] See references in Schrader, *Inst. hoc loco.* The precepts are rightly, I think, connected with the three cardinal virtues of the Stoics by Thomasius, *Not. ad Inst. h. l.* cited by Schrader.

[2] *Dig.* l. 17, fr. 144 pr. Cf. *Dig.* xxiii. 2, fr. 42 pr.; and l. 17, fr. 197 where it is said of marriage 'semper in conjunctionibus non solum quid liceat considerandum est, sed et quid honestum sit'.

[3] See the criticism by Savigny, *System*, i, p. 409, who regards the *precepta* not as rules of law but as the basis on which rules of law rest. Puchta, *Inst.* § 102 n.c, thinks

It would have been more logical still for Justinian to have said that the universal precept of law is to do justice—*justitia* having been already defined as 'constans et perpetua voluntas jus suum cuique tribuendi'.[1] On the other hand, if each of the three precepts was intended to be taken in a restricted sense, they seem incomplete, and might have been added to appropriately. Thus Ulpian might have borrowed from Gaius and added 'male nostro jure non uti'.[2]

2. Public law is tripartite, consisting *in sacris, in sacerdotibus, in magistratibus.*[3] This strange classification is also taken from Ulpian, and is a subdivision of his primary dual division of law into *jus publicum* and *jus privatum.* It is interesting to notice that a tripartite division of law into *jus sacrum, publicum* and *privatum* was current among writers before Ulpian and is given by Quintilian,[4]

the precept *honeste vivere* may be a 'Reminiscenz aus den Stoikern (Cic. *de Fin.* ii. 11)', and adds 'Es würde dann eine Bestätigung davon sein, dass dergleichen Entlehnungen so gut wie gar keinen Einfluss auf den eigentlichen rechtlichen Gehalt der Thätigkeit der Juristen hatten, denn wir finden nicht dass aus jenen praecepta juris das Recht wirklich abgeleitet worden wäre'. On this view see *infra*, p. 71, n.[1].

[1] *Inst.* i. 1 § 1. [2] Gai. i § 53. [3] *Supra*, p. 20, n.[3].

[4] *Orat.* ii. 4. 38. It is also given by Ausonius, *Edyll.* xi, l. 62; *supra*, p. 6, n.[2].

and also appears (though in a somewhat different sense) in the Code.[1] For Ulpian to have adopted this would, of course, have prevented his trichotomy of *jus publicum*. Under *magistratibus* we must apparently place the vast subjects of the legislature, the magistracy, imperial administration and taxation, in short the whole of constitutional and administrative law. But is there any real distinction between *sacris* and *sacerdotibus* so as to justify the jurist in placing each of them separately on the same plane with *magistratibus*? Either term alone would quite as well have represented all public matters of the *jus divinum*, as *magistratibus* represented those relating to the *jus humanum*. But for any practical consequence the classification was worthless and seems to have been ignored. A twofold division into *jus divinum* and *humanum*,[2] corresponding to matters of Church and State in modern law, the *jus humanum* being subdivided into *publicum* and *privatum*, would have been the natural and logical one. The division into *jus divinum* and *jus humanum* was, in fact, quite well known to Ulpian and was adopted by him in dealing with interdicts.[3]

3. Private law is tripartite, viz. law (1) common

[1] *Cod.* i. 2, 23.

[2] See Cic. *de Legibus* ii and iii.

[3] *Dig.* xliii. 1. 1 pr.

to men with the lower animals (*jus naturale*), (2) common to all peoples (*jus gentium*), and (3) binding upon Roman citizens alone (*jus civile*),[1] This division of private law is from a different point of view to that of public law but is scarcely less objectionable. It can hardly have originated with Ulpian (in his *Institutions*), but much more probably is due to some unknown Stoic philosopher from whom he drew; and, if we except perhaps two unimportant writers, Hermogenianus and Tryphoninus,[2] it was not adopted by any other jurist. The twofold division of Gaius into *jus gentium* and *jus civile*[3] was of course perfectly well known to Ulpian, and, so far as the *Corpus Juris* shows, this was the only one which the jurists distinctly recognized.[4] We can say at

[1] *Supra*, p. 20.

[2] Savigny (*System*, Beilage i, p. 415) thinks that these two jurists adopted the trichotomy, but the passages in the *Digest* bearing on the point are not conclusive, viz. *Dig.* xii. 6, fr. 64; xvi. 3, fr. 31; and i. 1, fr. 5. It has been suggested that the first two of these, and a passage from Paul, *Dig.* xviii. i. 34 § 1, have suffered interpolation; see Mitteis, *Privatrecht*, p. 63 n. This seems improbable.

[3] Gai. i. 1. Cicero, *de Off.* iii. 5, 23, had said 'jus naturae id est gentium.'

[4] E.g. Marcian in *Dig.* i. 8, fr. 2 and 4; Florentine in *Dig.* i. 8, fr. 3; Paul in *Dig.* i. 1, fr. 11, and xxiii. 2, fr. 14 § 2, and l. 17, fr. 84 § 1; Modestine in *Dig.* xxxviii. 10, fr. 4 § 2. The term *j. g.* is used by them sometimes in a wide, sometimes in

any rate that no jurist recognized a distinction between *jus naturale* and *jus gentium* so far as practical effects were concerned. *Jus naturale* is defined by Ulpian as 'quod natura omnia animalia docuit', such as 'conjunctio maris atque feminae, liberorum procreatio, educatio'.[1] This definition elevates the instinctive actions of birds, beasts, and fishes to the domain of law, and astonishment has been often expressed by modern writers that a scientific lawyer like Ulpian should have adopted it. At the same time attempts have been sometimes made to defend or explain it on philosophical grounds (e.g. on the Stoic doctrine of living according to nature), but none of these can be admitted by jurisprudence.[2] Law is not concerned with instincts that are common to man and the lower animals.[3] The only theoretic consequence which Ulpian himself deduced from it was that slavery was contrary to the law of nature but sanctioned by *jus gentium*[4]; as regards prac-

a narrow sense. Cf. Mitteis, *l. c.* and authorities there cited.

[1] *Dig.* i. 1, 1 § 3.

[2] See Savigny, *System* i, p. 416; Vinnius, *Com. ad Inst.* i. 2 pr. Ulpian himself says (*D.* ix. 1, 1 § 3) 'nec enim potest animal iniuria fecisse quod sensu caret'.

[3] Cic. *de Fin.* iii. 20. 67.

[4] This conception was undoubtedly borrowed from the Stoics. Even as regards slavery it is hard to suppose that

tical consequences he really did not adhere to or make any use of it, but on the contrary positively identified *jus naturale* and *jus gentium* in various passages in his writings other than the one above cited.[1]

Justinian in his *Institutes*, while so far adopting the tripartite division of Ulpian, makes at the same time a variation from it which Savigny rightly describes as senseless (*gedankenlos*).[2] He first gives Ulpian's definition of *jus naturale*, and then proceeds to define *jus gentium* in the words of Gaius as 'quod naturalis ratio inter omnes homines constituit'.[3] He then further somewhat modifies his definition of *jus gentium* by applying it to the settled usages of mankind and the requirements of social life ('usu exigente et humanis necessitatibus'),[4] as shown by the consensual and

Ulpian can have had in view his own definition. Mediaeval lawyers following Ulpian fell into similar difficulties on the subject. See Odofredus in *Digestum Vetus* i. 1 § 6, citing a gloss of Irnerius (*lucerna juris*). This gloss is given by Savigny, *Geschichte des röm. Rechts im Mittelalter* iv, p. 387. See also Carlyle, *Mediaeval Political Theory in the West*, vol. ii, pp. 28–33.

[1] E. g. *Dig.* ix. 2, fr. 50; x. 4, fr. 8 § 15; xvi. 2, fr. 6; xliii. 16, fr. 1 § 9; xliv. 7, fr. 14; l. 16, fr. 10.

[2] *Inst.* i. 1 § 4; i. 2 pr. See Savigny, *System* i, p. 419.

[3] *Inst.* i. 2 § 1.

[4] *Inst.* i. 2 § 2.

other contracts,[1] and then finally, as every tyro knows, altogether ignores in the rest of the work (save as regards the origin of slavery) the tripartite division, and even in one passage expressly identifies *jus naturale* with *jus gentium*.[2] There was indeed a sense in which, in the time of the classical jurists, *jus naturale* was distinguishable from *jus gentium* and might have justified a tripartite division. The law based on 'naturalis ratio inter omnes homines' (called *jus gentium* in Gaius i. § 1, and *Inst.* i. 2 § 1) truly represented the *jus naturae* or *naturale* of the philosophers and philosophizing lawyers of the early empire.[3] It was essentially theoretical and based on speculation, and in this sense was distinguishable from *jus gentium* historically considered, which formed from an early period part of the *jus Romanum*.[4] That *dominium* might be acquired by *occupatio* and *traditio* and that civil contracts might be created by mere consent were illustrations of *jus gentium* in this latter sense, and to it the name might well have been confined; while upon the *jus naturale*, in

[1] Following in this Ulpian and Hermogenian—*Dig.* l. fr. 1 § 5 and frs. 4 et 5.

[2] See *Inst.* i. 2 § 11, and ii, 1 § 11.

[3] Cf. Cicero, *de Off.* iii. 5. 23.

[4] This is vaguely contemplated in *Inst.* i. 2 § 2, but the definition there is too wide for the historic *jus gentium*.

its wide speculative conception, depended *inter alia* such dogmas (the product mainly of Stoic philosophy operating upon the jurists), as the personality of slaves, *naturalis cognatio* and *naturalis obligatio*.[1] Unhappily, however, the jurists, as already indicated, failed to make any precise distinction between the two. However this be, it noways justifies Ulpian's tripartite division, which must ever remain what Savigny calls a *Curiosität*, and seems only explicable on the hypothesis for which I am contending.

4. The statement of Modestine regarding the sources of law that 'omne jus aut consensus fecit aut necessitas constituit aut firmavit consuetudo'[2] is very different in its point of view from that of Papinian in *Dig.* i. 1, fr. 7 (who divides the sources of the written law into five parts), and from the well-known divisions given by Gaius and Justinian in their *Institutes*. Modestine's classification is obviously traditional, and Cujacius thinks it was taken from the Greek of Menander. Modestine was not the kind of man to originate it. It is

[1] See on this Voigt, *Jus naturale*, etc., i, pp. 286 sq.; Krüger, *G. d. Quellen*, § 17. Early writers on International Law, e. g. Grotius and Puffendorf, lay stress on this distinction. For Greek law see Schulin, *Geschichte d. röm. Rechts*, pp. 85–6.

[2] *Supra*, p. 20.

both scientifically and practically worthless, though Cujacius makes an ingenious, if futile, attempt to explain it.[1] No use was ever made of it.

5. 'Jus praetorium est quod praetores introduxerant adjuvandi, vel supplendi vel corrigendi juris civilis gratia.'[2] This, in some respects admirable, definition of Papinian has been much commented upon by modern writers on Roman law, and treated as if it represented (which it hardly does) an exhaustive summary of the praetors' reforms.[3] Yet its three parts—what Cujas calls the 'tres virtutes juris praetorii'—awaken suspicion, and I cannot resist the supposition that it was borrowed from some quasi-philosophic writer. With it may be compared the definition in Justinian's *Institutes*, where the expressions *confirmandi*, *emendandi*, and *impugnandi*, *juris civilis gratia* are used.[4]

[1] Cujac. *Obs.* xiv, c. 16. He thinks that 'omne jus' must be limited to *leges*, *senatus consulta*, and *consuetudo*, to which threefold division of topics the rubric of the Title (*Dig.* i. 3) is confined. His comments are very strained and unconvincing. He also endeavours to explain the text alternatively on the assumption that it applies to the whole body of law. If he had thought of a Stoic trichotomy he would have saved himself the trouble. See also Otto, *Thesaur.* iii, p. 695.

[2] *Supra*, p. 20.

[3] See e. g. Sohm, *Inst.*, pp. 540 and 547.

[4] *Inst.* iii. 9, pr. § 1.

6. The imperial constitutions as a source of law are divided into three kinds, viz. *decreta*, *edicta*, and *epistulae*.[1] This purely legal classification does not seem open to serious objection. It may have originated with Gaius and at any rate cannot be much earlier than his time. Nevertheless it is incomplete, as it omits *mandata*.[2] These *mandata* though sometimes contrasted with *constitutiones* (e. g. *Dig.* xlvii. 11. 6) cannot be sensibly distinguished from, but were a species of, them. Reasons have been suggested for this omission by modern writers, but none of them satisfactory. Thus it has been said by some that, as they are of the nature of *edicta*, they may have been intended to be included in that category; by others that they were intended to be included under *epistulae*, and by others that they were deliberately excluded because they related mainly to matters not of private but of public law.[3] But these views cannot be maintained, it is thought, in face of the texts.[4]

[1] *Supra*, p. 20; Krüger, *Quellen*, p. 99.

[2] How far *leges datae* (e. g. *lex Salpensana*) should also be included may be a question. See Schulin, *Gesch. d. röm. Rechts*, p. 102.

[3] See Schrader, *Inst.* i. 2 § 6; Puchta, *Inst.* as in next note.

[4] See *Dig.* iv. 1, 1 pr.; xxix. 1, fr. 1, pr., fr. 2; xxxiv. 9. 2 § 1; Pernice rev. Wlassak, *Z. d. Sav. Stift.* vi, pp. 297–8. On the possibility of an interpolation in *Dig.* i. 4. 1 § 1, see Puchta, *Inst.* i § cx, note *g*.

7. The subject-matter of private law relates to persons, things, and actions.[1] *Personae, res,* and *actiones* represent respectively the subjects, objects, and sanctions of rights. I will not enter upon an exhaustive criticism of this famous classification, upon which so much has been already written, and which has so largely dominated the method of mediaeval and modern writers upon law. It has its conveniences but it is quite illogical. Apart from the illogicality of co-ordinating the law of actions with that relating to persons and things, to which it stands properly as adjective, the classification forced Gaius to treat property as a *res corporalis,* and succession and obligations as *res incorporales,*[2] rights to things being thereby confounded with things themselves.[3]

[1] *Supra,* p. 20.

[2] As is well known, it has been doubted whether obligations were intended in the classification in Justinian's *Institutes* to fall under the head of *res* or *actiones.* Theophilus in his *Paraphrase* treated them as falling under actions.

[3] See Austin, *Jurisprudence,* ii, pp. 764–6. Austin remarks on the Gaian method—'In pursuance of that well-founded distinction between Law of Persons and Law of Things, which Gaius . . . has adopted, the main division (according to Ends and Subjects) should not have been threefold (still less fourfold) but twofold; the matter of the Law of Actions (i. e. civil procedure), as unmodified by *status,* . . . being

Here also it is a question whether Gaius borrowed his tripartite division direct from some earlier writer, and the probabilities are all in favour of his having done so. It had already, at any rate, been foreshadowed in non-legal works—as, for instance, in Varro's *Antiquitates*, where, in connexion with the doctrine of *res divinae*, he treats first of persons in relation to things, then of *loca sacra vel religiosa*, and finally of the Calendar and days of festival.[1] All attempts to explain the classification on grounds of abstract jurisprudence seem to me quite vain,[2] as, for example, the old theory of Duarenus that Gaius did not intend the three parts to be mutually exclusive, but used them rather to indicate that the whole law may be

included under the Law of Things, and the several modifications, under the several *status* out of which they arise.'

[1] See Girard, *Textes*, 3rd ed., p. 203; Karlowa, *R. R. G.* i, p. 725. For the view that it was more probably due to Gaius than traditional, see Savigny, *Syst.*, i, pp. 395–7, where he refers to Hugo, *Civil Mag.* 5, p. 403, and 6, p. 286. Hugo's view that it was taken from some early non-juristic writer seems to me most probable. Karlowa, l. c., remarks 'diese Eintheilung ist aller Wahrscheinlichkeit nach ein altes Gemeingut der römischen Rechtsgelehrten, auf sie vererbt von der alten pontifizischen Jurisprudenz', and refers to Böcking, *Pandekten*, i², Anhang vi.

[2] See Austin, *Jurisprudence*, ii, pp. 764–66.

studied in relation to any one of them.[1] The author of the division (whether Gaius or another) wanted a *tripertita*, and the doctrines had to be fitted into it somehow. One may, however, well attribute the division to the traditional influence of the Stoa[2]—a view which seems to me to be supported by the fact that Ulpian in his *Institutions* makes, or rather borrows, another scholastic trichotomy of the *omne jus*, which, as we will see under next head, is without any scientific value whatever.

8. In his *Institutions*, as cited in the *Digest*, Ulpian says: 'Totum autem jus consistit aut in adquirendo aut in conservando aut in minuendo: aut enim hoc agitur quemadmodum quid cujusque fiat, aut quemadmodum quis rem vel jus suum

[1] The passage of Duarenus is quoted by Böcking in an appendix to his edition of Gaius and by Emerton, *The Threefold Division of Roman Law*, p. 19 (London, 1888). Emerton founds on the use by Gaius of *vel* instead of *aut* in the division, as confirming the view of Duarenus, but his arguments are to my mind quite unconvincing. Cf. Savigny, *Syst.*, *ut sup.*

[2] Compare the division of Philosophy by the Stoics into Logic, Natural Science, and Ethics. See Zeller, *Stoics, Epicureans and Sceptics*, chap. iv. (Reichel's Trans.), pp. 62–7; August. *de Civ. Dei*, xi, c. 25. But for my thesis it is immaterial whether it was taken from a Stoic writer on jurisprudence or was an inheritance from old pontifical traditions.

conservet, aut quomodo alienet aut amittat.'[1] This is a rather strange limitation of the *totum jus*, but we may perhaps assume that Ulpian is here referring to the *jus privatum* alone. Can any one doubt that it represents one of Ulpian's borrowings from some philosophic or pseudo-philosophic treatise? Apparently he attached no significance or importance to it whatever. Commentators have as a rule, so far as I have observed, left the passage severely alone, but Savigny makes some observations about it. After stating the proposition that every legal relation has its own special rules according to which in respect of any specific person it comes into existence and again is extinguished, and that these rules are of such importance that in many legal relations they form the sole ground of inquiry, he cites the above passage in a note and remarks: 'Hier wird noch ein neues Moment in die Mitte jener beiden [i.e. Entstehung and Untergang] gestellt, das *conservare*. Nimmt man dieses im eigentlichen Sinn für die Bewirkung der Fortdauer des Rechts selbst, so fällt es mit dem dritten zusammen, indem es dann als die Negation des dritten (oder umgekehrt) aufgefasst werden kann; dann sagt aber auch das *totum ius consistit* viel zu viel. Ist

[1] *Supra*, p. 21, n.[1].

dagegen das *conservare* als Erhaltung der Ausübung, oder als Rechtsverfolgung, gedacht, so umfassen allerdings jene drei Momente den grössten Theil aller Rechtsregeln überhaupt: dann aber sind die drei Momente nicht so gleichartig dass diese Zusammenstellung derselben gerechtfertigt werden könnte.'[1] All this may be admitted, but the ineptitude of the text and its worthlessness to Ulpian himself remain to my mind perfectly clear. No use is made of it.[2]

9. The grouping of persons into three classes, viz. (1) *liberi* and *servi*, (2) *cives*, *latini*, and *peregrini*, and (3) *sui juris* and *alieni juris*, is not formally given by Gaius, but it appears to have been before his mind quite distinctly nevertheless. Whether it was borrowed by him is unknown. In terms, however, the second class is confined by him to *liberti*, whom he divides into *cives*, *latini*, and *peregrini dediticiorum numero*.[3] The reason why a similar division of the second class was not made specifically by him for the *ingenui* is not easy to say. It may have been that he regarded the discussion of *civitas* and *peregrinitas* as falling under

[1] *System*, iii, p. 2, note (b).

[2] Except perhaps the triad of interdicts? See *infra*, p. 53.

[3] Gai. i § 12; see *supra*, p. 21, n.[3]; *infra*, p. 41; Mommsen, *Staatsrecht*, iii. 1, p. 8[2].

public rather than private law. Whatever the reason, he only notices freeborn citizens, latins and peregrins incidentally, and in so far as it enables him to discuss by analogy the three classes of *libertini*. It is an obvious defect of the above classification that slaves fall under both (1) and (3).[1]

10. Persons are again treated by Ulpian as divisible jure gentium into three classes, 'liberi et his contrarium servi et tertium genus liberti.'[2] This is apparently an illogical division, as *liberti* are not co-ordinate with the other two but form a subordinate class of *liberi*. It is moreover inconsistent with Ulpian's own definition of manumission as 'datio libertatis' (*Dig.* i. 1, 4). Gaius avoids the illogicality and rightly divides persons into *servi* and *liberi*, subdividing the latter into *ingenui* and *libertini*.[3] Some commentators have suggested that by *liberi* Ulpian meant *ingenui*,[4] but this would also make a bad classification and is merely an attempt to save his logic.

[1] For a logical classification of persons see Savigny, *System*, ii, pp. 58–9.

[2] *Supra*, p. 21, n.[3]. His language seems to indicate a traditional division.

[3] Gai. i § 9. Justinian's editors give first the Gaian classification (*Inst.* i. 3 pr. § 5), and then carelessly that of Ulpian (*Inst.* i. 5 pr.).

[4] See Schrader, *Inst.* i. 5 pr.

Moreover, a classical jurist would not have used *ingenuitas* in this way in contrast with *servitus*. It is hard to suppose that Ulpian, to whom the dual classification of Gaius must have been familiar, should have been unconscious that he was making a cross division. Whether he borrowed it or not, I see no explanation but the desire for a tripartite division.

11. Gaius (i § 17) says, regarding acquisition of *civitas* by a manumitted slave, 'in cujus persona tria haec concurrunt, ut major sit annorum triginta, et ex jure Quiritium domini, et justa ac legitima manumissione liberetur, id est vindicta aut censu aut testamento, is civis Romanus erit; sin vero aliquid eorum deerit, Latinus erit.' Here we are given, first, three conditions for, and second, three modes of, manumission. As regards the conditions, it was only the second and third that were required by the old *jus civile* to make a Roman citizen; the first was due to the lex Aelia Sentia. Apparently the three conditions are intended to be exhaustive, but, if so, they are wanting in accuracy. The age of the master, for instance (he must be over twenty years), had by the Aelia-Sentian law as much to be considered as that of the slave,[1] But this

[1] Gai. i §§ 18, 38; cf. Ulp. *Reg.* i §§ 12, 18. In the

may perhaps be a mere oversight of Gaius or due to his mode of exposition.

Besides the three forms of manumission mentioned (which Ausonius apparently gives as an illustration of the *ternarius numerus*, under the name 'triplex libertas'[1]), there were other modes of a slave being legally manumitted and obtaining *civitas*, e. g. grant by the State under various enactments.[2] In any case the trichotomy is an old one and purely Roman.

12. The classification above mentioned of freedmen into *cives*, *latini*, and *dediticiorum numero*,[3] is obviously the symmetrical counterpart of the division of freemen into *cives*, *latini*, and *peregrini*, and is, as we have seen, one of the three groups under which Gaius discusses persons

West Gothic Gaius the regular modes of manumission are different but are kept tripartite, viz. 'testamento, aut in ecclesia, aut ante consulem.' Gai. *Epit.* i. 1.

[1] *Edyll.* xi, l. 65, but see *infra*, p. 42, n.[1].

[2] See also *Inst.* i. 11 § 12, adoption by a master of one of his own slaves. The irregular modes of manumission by which Junian latinity was obtained were also classified as threefold in the West Gothic Gaius, where it is said 'Latini sunt qui aut per epistolam aut inter amicos aut convivii adhibitione manumittuntur'. As to the magistrates before whom manumission could take place cf. Ulp. *Reg.* i § 7—apparently consul, praetor, proconsul—with *Inst.* i. 5 § 2, and Schrader's note *hoc loco*.

[3] *Supra*, p. 21. See also Gai. *Epit.* i. 1.

in the first book of his Commentaries. In the *Institutes* of Justinian this classification of freedmen is called *tripertitus status.*[1] It cannot of course be earlier than the Empire, as it was based on the lex Aelia Sentia and lex Junia.

As we learn from Gaius (iii §§ 74–6) these *dediticii* were, in the matter of succession to their states, treated sometimes as citizens and sometimes as latins, this depending on the nature of their manumission.[2] The only criticism one can make upon the classification is that it is not exhaustive. There were other freedmen who were *peregrini*, though not in the number of *dediticii*, viz. those manumitted by peregrin owners in accordance with the laws of the latter's own *civitas.*[3]

13. Persons *alieni juris* were said to be either *in potestate*, or *in manu*, or *in mancipio.*[4] In the early period of Rome the only word to express the powers of a paterfamilias over the familia was

[1] *Inst.* i. 5 § 3. It is not certain whether the term 'triplex libertas' in Ausonius, *Edyll.* xi, l. 65, applies to this or to the three modes of manumission. Probably the latter.

[2] Cf. Gai. i § 17.

[3] Pliny, *Ep.* x. 4; *Frag. Dosith.* § 12. See Girard, *Manuel d. d. r.*, 4th ed., p. 126.

[4] *Supra*, p. 21, n.[6].

probably *manus*; *potestas* was a word of later origin. But in time *manus*, though still occasionally used in a general sense to express power,[1] became technically restricted to power over a wife. *Mancipium* was also a term of early law used in a variety of senses, but in time came to mean (in the expressions 'in mancipio' or 'in causa mancipii') power of a paterfamilias over free persons mancipated to him, not being *liberi* or *loco liberorum*. *Potestas* was, like *manus* in early times, a general term for power of the head of the house, but was more specially applied to power over slaves and children. This tripartite division, however, as given by Gaius and Ulpian, is quite artificial and without solid basis. Considering the fundamental difference in the time of the classical jurists between slaves and children, one would naturally expect a fourfold division of persons *alieni juris*, viz. those in *dominica potestate*, those in *patria potestate*, those in *manu*, and those in *mancipio*—and in fact Gaius does discuss them as if so classified.[2] It has been

[1] e. g. *Inst.* i. 5 pr.; *Dig.* i. 1, 4 and i. 2, 2 § 1; *Cod.* viii. 48. 6.

[2] Gai. i §§ 49 sq. The classification is doubtless older than Gaius. In Justinian's *Institutes*, as *manus* and *mancipium* were in desuetude, there is a twofold division into

justly observed by Poste, 'The powers of the head of the family were nominally three, *potestas*, *manus*, *mancipium*; *potestas*, however, was either *potestas dominica* . . . or *potestas patria* . . ., which at the period when Roman law is known were different in kind; so that the rights of a pater-familias were really fourfold.'[1] The differences between *patria* and *dominica potestas* were at all times much greater than those between *manus* or *mancipium* and *patria potestas*.

14. On Gaius's (and presumably Ulpian's) division of marriages *cum manu* into *confarreatio*, *coemptio*, and *usus*,[2] there is only this remark to be made that Gaius gives it as traditional, and, though possibly correct at one time, it was out of date at the time he wrote. It is a purely Roman trichotomy. Hand marriages were still in the second century of our era contracted by coemption, though rare, and even for certain purposes by confarreation,[3] but *usus* as creative of *manus*, as Gaius tells us, had been abolished partly by

persons *in dominica*, and persons *in patria potestate*. *Potestas* was also applied to the power of guardians over wards. XII Tab. v. 7; *Inst.* i. 18 § 1; *Dig.* xxvi. 1, 1 pr.; Aul. Gell. v. 19. 10. See also *Dig.* l. 16, 215.

[1] Poste, *Gaius* (3rd ed.), p. 40.

[2] *Supra*, p. 21, note [7].

[3] Gai. i §§ 112, 113, 136.

statute and partly by desuetude before his time.[1] Gaius apparently says not a word about the constitution of marriage by simple consent, which was the ordinary mode in his time.[2]

15. Extinction of *patria potestas* over sons was effected by three sales and three corresponding manumissions. I have already sufficiently discussed the symbolism of this.[3] It is probable, and it seems to be the view generally accepted, that originally this rule applied to all descendants, and that it was by casuistical interpretation of the word 'filium' in the law of the XII Tables, that a single mancipation and manumission was subsequently held to be sufficient in the case of daughters and grandchildren.[4]

16. Persons *sui juris* are distributed by Gaius and Justinian in their *Institutes* into those in tutory, those in curatory, and those who are in neither the one nor the other.[5] The Romans had no technical term equivalent to our English

[1] Gai. i § 111.

[2] Had this traditional tripartite division anything to do with Justinian's treatment of marriage in the *Digest*? See *Const. Tanta*, § 5; Hofmann, *Ztsch. f. R. G.* xi, p. 350, who says, 'Die Zahl drei bedeutet unter anderem auch die Ehe.'

[3] *Supra*, p. 18 and p. 22, n.[1].

[4] See Jhering, *Geist des röm. Rechts*, ii, p. 104.

[5] *Supra*, p. 22, n.[2].

'infant' signifying a person under majority, or to our English 'ward' signifying any person under guardianship, nor had they any general term equivalent to guardianship. Pupilarity and minority were with them fundamentally distinct and had different effects, and it was proper for them to treat tutory and curatory separately. But we have here a strange tripartite division, of which the third class is wholly uncalled for, save in order to be symmetrical with the division of persons *alieni juris*. The way in which the classification is made shows that it was intended to be threefold: 'Videamus igitur quae in tutela, quae in curatione sint; ita enim intellegemus ceteras personas quae neutro jure tenentur.'[1] It would have been as reasonable for Gaius to have treated of marriage by dividing persons into those married *cum manu*, those married *sine manu*, and those who are neither. But a threefold classification, of which one of the heads does not, *ex necessitate*, admit of discussion in relation to the other two, is worthless.

17. In the *Institutes* of Justinian and also in the *Digest* tutors are treated (without any formal

[1] Gai. i § 142; cf. Gai. i §§ 50, 51. These divisions rest on the principle of Aristotelian logic—'contrariorum cognito uno, cognoscitur et alterum.'

classification being given) as divisible into *testamentarii*, *legitimi*, and *a magistratibus dati*,[1] and this is not objectionable. It was familiar to Ulpian and doubtless used by him. But in his Rules he gives formally a separate tripartite division, viz. *legitimi*, *senatusconsultis constituti*, and *moribus introducti*, and this seems highly artificial.[2] It seems to be conceived from the point of view of the sources from which the office of tutor is derived. But the first class (the *legitimi*) is altogether out of proportion to the other two, embracing as it does each of the three kinds in the above-mentioned Justinianian treatment, i.e. tutory-at-law (agnatic and patronal) as well as testamentary and ordinary magisterial tutory.[3] The second

[1] *Inst.* i, tits. 13–20; *Dig.* xxvi, tits. 2–5.

[2] Ulpian, *Reg.* xi §§ 2–24. Ulpian seems at times to lose sight of it. See §§ 5, 6, where he distinguishes apparently *tutor fiduciarius* from *tutor legitimus*. As Gaius tells us (i § 172), the former was thought to be unable to cede *in jure* his tutory while the latter could do so. See Ulp. *Reg.* § 17. Like his tripartite division of the *totum jus* (*supra*, p. 86), Ulpian evidently attaches no importance to this division.

[3] While Gaius, i § 168, subdivides tutors-at-law into three, viz. *agnati*, *patroni*, and *liberorum capitum manumissores*, Justinian in the *Institutes* subdivides them into *agnati*, *patroni*, *parentes*, and *fiduciarii*. Ulpian, on the other hand, in a passage in the *Digest* (xxvi. 4, 1 pr.), ascribes to the XII Tables three species, viz. *agnati*, *consanguinei*, and *patroni*—a

and third classes represent merely such magisterial tutors as were appointed in special cases either by virtue of a senatusconsult or by custom. The senatorial tutors were appointed by magistrates only in a few exceptional cases, as, e.g. where a legitimus patronal tutor of a woman was dumb or insane and *auctoritas* was required to constitute her dowry,[1] while the tutors by customary law were likewise appointed by magistrates exceptionally, as, for instance, where a pupil or adult woman was desirous of raising an action against his or her proper tutor.[2] In any proper classification it is obvious that these special cases would have been treated simply as exceptions in discussing the magisterial tutors, as in fact is done by Gaius.[3] Could Ulpian have had before his mind the Ciceronian 'si partiri velis tutelas, inscienter facias si ullam praetermittas'?[4] Gaius, speaking of the *species tutelarum*, as he calls them, viz.

plainly objectionable division. See Gothofredus, edition of *Corpus Juris* (1663), notes on this passage.

[1] Ulp. xi § 21; cf. Gai. i §§ 177, 180–3. By the lex Julia *de marit. ord.* the same course was followed where the patronal tutor was a pupil. Gai. i §§ 178–9; Ulp. xi § 20.

[2] Ulp. xi § 24; cf. Gai. i § 184. Such tutor was technically called *praetorius*.

[3] Gai. i §§ 176–84; cf. *Inst.* i. 21 § 3.

[4] Cic. *Top.* § 33.

the testamentary, agnatic and others, says this (i § 188): 'Si vero quaeramus in quot genera hae species diducantur, longa erit disputatio; nam de ea re valde veteres dubitaverunt, nosque diligentius hunc tractatum executi sumus et in edicti interpretatione et in his libris quos ex Q. Mucio fecimus. Hoc tantisper sufficit admonuisse quod quidam quinque genera esse dixerunt ut Q. Mucius; alii tria ut Ser. Sulpicius; alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.' This passage seems to show rather an odd lack of capacity for systematic arrangement among the earlier jurists.

18. Paulus says, 'Tria sunt quae habemus, libertatem, civitatem, familiam.'[1] But obviously, as Savigny points out, there were many other things in private law *quae habemus*, such as property, obligations, marriage, &c. What Paul probably however meant was that *status*, in the sense of *caput* or civic personality, is composed of three elements, viz. liberty, citizenship, and family. These made up a man's *caput* under *jus civile*. The classical jurists seem to have improperly invented the triad, holding that no one enjoyed full public and private rights who did

[1] *Supra*, p. 22. *Dig.* iv. 5, 11. See Savigny, *System*, ii. Beilage vi. 9 (pp. 508–10).

not possess all three. But *civitas* included *familia*. On the other hand, it is clear that in early times the distinction between *libertas* and *civitas* was unknown; if a person was not a citizen he was *de jure* a slave, he had no *caput*.[1]

19. *Capitis deminutio* is either the greatest, the middle, or the least.[2] There are various passages in the texts proving that originally there were only two kinds of *cap. dem.*, viz. the greater and the less (*magna* or *major* and *minor*), and that the division into three classes was due to the jurists of the last century of the Republic.[3] The *magna cap. dem.* meant loss of citizenship and with it all public and private civil rights; the *minor cap. dem.* meant loss of *caput* within the sphere of the private law alone, i.e. loss of existing family rights. This was sufficient to meet all cases. But the jurists,

[1] The word *liber* signifying both free and a child points to this. See as to *liber* and *libertus*, Mommsen, *Röm. Staatsr.* iii. pp. 8, 62, 421. Commenting on *Capitis deminutio*, Savigny (l. c. p. 511) says: 'die ganze Stelle des Paulus erscheint demnach nur als ein mislungener Versuch die dreifache Cap. dem°. auf eine rationelle Weise zu begründen.

[2] *Supra*, p. 22. Ausonius gives this as an illustration of *ternarius numerus*—*Edyll.* xi, line 65.

[3] Thus Ulp. in *Dig.* xxxviii. 16. 1 § 4, speaks of only *magna* and *minor*, but he is not there making any division. For the varying terminology in the texts see Savigny, *System*, ii § 68 d. Cf. Kuntze, *Inst.* ii. p. 368.

founding on the distinction, which gradually grew up, between that loss of citizenship which carried with it loss of liberty, and that which did not, but reduced merely to the status of peregrin, divided the *magna cap. dem.* into *maxima* and *media* or *minor*, and gave the name *minima* to *cap. dem.* within the private law. Thus they got a triad. In both the *maxima* and *media* there was loss of citizenship; but the former, it was said, reduced to slavery, the latter did not.[2] We have thus an attractive but somewhat irrational symmetry—*maxima* includes the other two, *media* includes *minima*—to which the three elements of *status* above considered, viz. *libertas, civitas, familia*, were made to correspond.[3] This view of the origin of the threefold division is, indeed, only conjectural,

[1] Could a *non civis* be said to undergo *cap. dem. maxima*? There is no sufficient evidence of it, though it has been maintained by some writers. See Cohn, *Beiträge*, Heft ii. pp. 46 sq.

[2] Mommsen observes, *R. S.-R.* iii. 1, p. 8—The Roman jurists, in order to support their threefold division into (1) *liberi et servi*, (2) *cives, L., p.*, and (3) *sui et alieni juris*, have obscured the meaning of *cap. dem.* by setting up three degrees of it, 'obwohl sie selbst diese mehrfach auf zwei zurückführen und zurückführen müssen, weil dem späteren Privatrecht Freiheit und Bürgerrecht zusammenfällt. In der That sind es nicht zwei Grade, sondern zwei verschiedene, obwohl correlate Rechtsbegriffe.'

but it has received incidentally a good deal of support from the inquiries of recent writers.[1]

If the foregoing critical remarks be sound, it must be admitted that the great bulk of the classifications in the department of the law dealt with are traditional *tripertita* resting on no logical basis and only explicable on the theory for which I am contending. In the other departments of the law discussed in the three remaining books of the *Institutes* of Gaius and Justinian the tripartite division, though it frequently occurs, is apparently not so prominent as in the first books, while in the department of obligations in Justinian's *Institutes* it wholly gives place, as I have shown in the *Studi Fadda*, to artificial quadripartite classifications. However, I will now notice a few threefold divisions in the departments of the law relating to *things* and *actions* that have given rise to difficulties and seem to me to support my thesis.

(*a*) There are two well-known tripartite classifications of interdicts. By the first, which is called *summa divisio*, they are divided into *exhibitory*, *restitutory*, and *prohibitory*.[2] On this I will content

[1] See Mommsen, *Staatsrecht*, l. c.; H. Krüger, *Cap. Dem.* vol. i.

[2] Gai. iv. § 142; *Inst.* iv. 15 § 1; Paul in *Dig.* xliii. 1.

myself with quoting the following significant passage from Ulpian: 'Interdictorum autem tres species sunt; exhibitoria, prohibitoria, restitutoria; sunt tamen quaedam interdicta et mixta, quae et prohibitoria sunt et exhibitoria.'[1] Here Ulpian mentions four classes and yet says 'tres species sunt'.[2]

The second classification is that of the so-called possessory interdicts, they being divided into *adipiscendae*, *retinendae* and *recuperandae possessionis causa*;[3] Ausonius, in his *Griphus* above mentioned, gives this as an illustration of the *ternarius numerus*. He says:

> 'Interdictorum trinum genus; unde repulsus
> Vi fuero, aut utrobi fuerit, quorumve bonorum.'[4]

As is well known, this classification of possessory interdicts has largely governed the doctrine on the subject. Yet it has often been objected to as illogical, and various attempts have been

1 § 1. Gaius specifies, in all, three divisions (*tria genera*) of interdicts (iv. §§ 142, 143, 156), of which, however, the third, *simplicia* and *duplicia*, is bipartite. There were in fact numerous other categories (e. g. Gai. iv. § 170).

[1] *Dig.* xliii. 1, fr. 1 § 1. See also *Dig.* xliii. 4, 3 § 2 and Karlowa, *Röm. R.-G.* iii. p. 1009.

[2] Cf. *Dig.* ii. 14. 5 cited *infra*, p. 55. See also Cic. *Brutus*, §§ 43 and 54, where Cicero does much the same thing.

[3] Gai. iv. § 143; *Inst.* iv. 15 § 2; Paul in *Dig.* xliii. 1. 2 § 3.

[4] *Edyll.* xi, lines 63–4.

made, from the time of Donellus onwards, to find a *ratio* for it. The interdicts *adipiscendae possessionis*, such as the *quorum bonorum* and the *Salvianum*, being destined for the obtaining of possession of things by one who makes no claim to having had previous possession of them, are, it is thought, distinct in their character from the *retinendae* and *recuperandae possessionis* interdicts, which were intended for the protection of previously existing possession. They are treated apart from the latter in the *Digest*. Savigny, in the earlier editions of his famous treatise, did not hesitate to exclude the *adipiscendae possessionis* interdicts altogether from the class of possessory, and charged the Roman jurists with inaccuracy in making the classification, but the idea that the co-ordination of the three was due to the influence of the *ternarius numerus* does not seem to have impressed him.[1] There existed also, as we learn from Paulus in the *Digest* xliii. 1. 2 § 3, and the Vienna fragments of Ulpian's *Institutes*, interdicts 'tam adipiscendae quam reciperandae possessionis'

[1] Sav. *Poss.* § 37. He slightly modifies his view in later editions. To defend the classification on the ground of its having in each case a *jus possessionis*—i.e. the external object of the suit—as its basis would, Savigny holds, be quite unscientific. For a contrary view see Cornil, *Possession* (Paris, 1905), pp. 307 sq.

(such as the *quem fundum*); but these, instead of being given by Paul and Ulpian as a fourth class with the three above named, are classified by them merely as in a sense *interdicta duplicia.*[1] As Paulus says: 'Sunt interdicta, ut diximus, duplicia tam reciperandae quam apiscendae possessionis.'[2]

(*b*) The exception of vitious possession in the possessory interdicts is also a *tripertita*, viz. *vi aut clam aut precario.*[3] This appeared in all interdicts *retinendae possessionis*, and is of Early Roman origin. Excluding, as it does, *dolus*, and for other reasons it can only be explained on my theory. Against the vitious possessor there seem also to have been three independent recuperatory interdicts, viz. *de vi*, *de clandestina possessione*, and *de precario*, but the nature of the second of these is unknown.[4]

(*c*) In *Digest* ii. 14. 5 (*de Pactis*) we get the following extract from Ulpian's Commentary on the Edict: 'Conventionum autem tres sunt species. Aut enim ex publica causa fiunt aut ex privata: privata aut legitima aut juris gentium.' Here there is apparent disregard of logic; *species* is improperly

[1] See Girard, *Textes*, p. 467. Cf. *supra*, p. 53, n.[1]

[2] *Dig.* xliii. 1. 2 § 3.

[3] Gai. iv §§ 150–1; cf. Terence, *Eunuch.* ii. 3, 28. See Cuq, *Nouv. Rev. Hist.* 1894, pp. 24 sq., who remarks: 'On tenterait vainement de la justifier.'

[4] *Dig.* x. 3. 7 § 5. See Puchta, *Inst.* ii § 225.

co-ordinated with *genus*. This is similar to what occurs, as we have already seen, in Ulpian's classification of persons into *liberi*, *servi*, and *liberti*,[1] and any emendation of the passage, as has been suggested, would be improper.[2] What one would have expected here (and it would have been in accordance substantially with the way in which Ulpian goes on to treat the subject) was a statement that there are two kinds of conventions, viz. *ex publica causa* and *ex privata causa*, and that, of the latter, there are two species, viz. *legitimae* and *juris gentium*. But Ulpian cannot refrain from his tripartite division.[3]

(*d*) The division of heirs into *necessarii*, *sui et necessarii*, and *extranei*[4] is open to objection. Gaius

[1] *Supra*, p. 39. Cf. the classification of interdicts, *supra*, p. 53.

[2] See Cujacius, *Observat.* lib. xv, c. 33; Otto, *Thesaur.* i, p. 570 and iii, pp. 270, 445. For an independent classification in accordance with Ulpian's presumed meaning, though not an explanation of the trichotomy, see Voigt, *Röm. R.-G.* ii, pp. 852–3. Cf. Glück, *Erläut. d. Pandek.* iv, p. 278, who describes the action of the *Digest* editors in connecting the *legitima conventio* of fr. 5 with that of fr. 6 as 'sehr unschicklich'.

[3] Cujac. l. c., where it is remarked—'Tres [species] sunt sane, si universas ita numeres, hoc est et genera et species simul, alias duae. Sunt enim generatim pacta, ἢ δημόσια, ἢ ἴδια, aut publica, aut privata.'

[4] Gai. ii § 152; *Inst.* ii. 19 pr.; Ulp. *Reg.* xxii §§ 24–5.

says: 'Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.' A grandson *in potestate*, whose father was also in that position, was, if instituted (the father being disinherited), *heres necessarius* but not *suus*, and yet the definition of the *heredes necessarii* does not include him.[1] Persons *in causa mancipii*, again, instituted heirs *cum libertate*, though classed as *necessarii*, had, like *sui*, the *abstinendi potestas* which slaves had not.[2] The true generic division is into *necessarii* and *voluntarii* or into *domestici* and *extranei*. Schrader remarks (*Inst. hoc loco*): 'Abit haec trimembris divisio, ut aliae pleraeque, in bimembrem necessariorum voluntariorumque.'

(*e*) A division of obligations made by Paulus from a processual point of view is into 'ad dandum aliquid vel faciendum vel praestandum'. He says—'obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.'[3] This obviously has reference to the formulae for enforcing them. The meaning of *praestare* is not

[1] Gai. ii § 153; *Inst.* ii. 19 §§ 1, 2. Only by a fiction can he be regarded as *suus et necessarius*.

[2] Gai. ii § 160.

[3] Paul in *Dig.* xliv. 7. 3 pr.; Gai. iv § 2.

certain, but it is certain that it only appeared in a formula (if at all) in a few special cases and ought not to have been co-ordinated with the other two. From this point of view Paul might almost as well have said 'damnum decidendum' as 'praestandum'.[1] *Praestare* was, in any case, comprehended by the generic *facere*.[2] Commenting on this Pauline division, Savigny says: 'In diesem Zusammenhang wäre das *faciendum* oder das *praestandum* (neben dem *dandum*) allein völlig hinreichend gewesen; die an sich überflüssige Zusammenstellung der drei möglichen Gegenstände enthält eine augenscheinliche Anspielung auf die drei gleichnamigen Arten der *Intentio* in den Klagformeln.'[3]

(*f*) The frequent trichotomy of *actio*, *petitio*, *persecutio* in the texts creates difficulties which modern writers have in vain attempted to resolve. It is in fact meaningless, and Ulpian and other jurists who adopt it only fall into inexactitude in

[1] *Praestare* was really a general term embracing *dare* and *facere*. See e.g. Gaius, iii § 155 and iv § 61. For different views as to *praestare* see Savigny, *Syst.* vol. v. App. xiv, pp. 599 sq. Cf. Lenel, *Edict Perpet.* 2nd ed. p. 287, n.[12], and p. 318.

[2] *Dig.* l. 16, fr. 175, fr. 189, fr. 218.

[3] *System*, l. c. p. 602. See also Puchta, *Inst.* ii § 165, note [aa], for various explanations by different writers.

attempting to explain it. What is the distinction between *actio* and *petitio?* Ulpian[1] and Papinian[2] say that specifically *actio* is used where the action is based on a personal, while *petitio* is used where based on a real right. Thus Ulpian says: '"Actionis" verbum et speciale est et generale. Nam omnis actio dicitur, sive in personam, sive in rem sit petitio; sed plerumque "actiones" personales solemus dicere. "Petitionis" autem verbo in rem actiones significari videntur. "Persecutionis" verbo extraordinarias persecutiones puto contineri, ut puta fideicommissorum et si quae aliae sunt, quae non habent juris ordinarii exsecutionem.' It is indisputable, however, that *petitio* and *petere* are constantly used as general expressions to indicate any kind of action, personal (e. g. in the expression 'si certum petetur') as well as real. In Paul's *Sentences* we have *petitio* actually put in contrast with *vindicatio.*[3] *Persecutio*, on the other hand, which Ulpian supposes to have applied to the *actiones extraordinariae*, was used quite indefinitely,[4] and Ulpian is here not supported but rather contradicted by Papinian.[5]

[1] *Dig.* l. 16, fr. 178 § 2. In a general sense he makes *actio* and *petitio* synonymous.

[2] *Dig.* xliv. 7 fr. 28.

[3] iv. 1. 18.

[4] e. g. *Dig.* xxxii. 41 §§ 9, 11.

[5] Cf. references in notes [2] and [4] *supra.*

Mitteis, who is the most recent writer to discuss this trichotomy, gives all the principal authorities, and I may refer to what he says.[1] After showing the impossibility of making any satisfactory distinction between the three terms, and the consequent inaccuracy of Ulpian's view, he concludes thus: 'Bestimmte Bedeutungen lassen sich hier überall nicht erkennen, und so kann man es denn schwer vermeiden, mit Bruns in "actio petitio persecutio" eine sinnlose Häufung der Ausdrücke zu finden' (Bruns, *Ztsch. f. R. Gesch.* xii. 118). What Bruns and Mitteis have called a 'sinnlose Häufung der Ausdrücke' it is preferable to call an example of persistent tendency to trichotomy.

(*g*) Heirs by the *jus civile* are classified by Ulpian as *sui*, *consanguinei*, and *agnati*:[2] 'Intestatorum ingenuorum hereditates pertinent primum ad suos heredes . . . ; si sui heredes non sunt, ad consanguineos, id est fratres et sorores ex eodem patre; si nec hi sunt, ad reliquos agnatos proximos.' Here the introduction of *consanguinei* is unnecessary,[3] and is not supported apparently

[1] *Privatrecht*, 1908, p. 39, n.[1] and pp. 89–91. The trichotomy, as he points out, was traditional, for it appears in older laws as the *lex Salpen.* 26, *lex Malacit.* 58, 62, *lex Urson*, 129.

[2] Ulp. *Reg.* xxvi. 1; cf. *Collat.* xvi. 4 §§ 1, 2.

[3] He makes a similar distinction as regards tutors-at-law

by any other jurist. The *consanguinei* are embraced by the term *agnati* in Gaius[1] and all other writers; in Ulpian's time there were only two classes of *heredes*, the *sui* and *agnati*. Neither is Ulpian's division in accordance with that of the XII Tables, which Gaius correctly gives as *sui*, *agnati*, and *gentiles*.[2] Is it not in order to avoid a fourfold division that Ulpian refers to the succession of the *gentiles* as merely matter of history?[3]

(*h*) Ulpian makes a tripartite division of the law into civil, praetorian, and imperial.[4] He is the only jurist who does so, but he is followed by Justinian in the *Institutes*.[5] This division is inconsistent with the general theory of the classical jurists that the emperors' Constitutions were but

in *Dig.* xxvi. 4, 1 pr. (where he also apparently intends a threefold division of *tutores legitimi*). See Glück, *Pandekt.* xxix, p. 325; *supra*, p. 47, note [5].

[1] Gai. iii §§ 1, 9, 17.

[2] Says Paul (*Collat.* iii. 3) 'Sane consanguinei, quos lex non adprehenderat, interpretatione prudentium primum inter agnatos locum acceperunt.'

[3] *Collat.* xvi. 4 § 2. This reference to the *gentiles* was also doubtless in the *Liber Regularum*, but was omitted by the copyist of the MS.

[4] *Dig.* l. 16 § 10—'Creditores accipiendos esse constat eos quibus debetur ex quacunque actione vel persecutione, vel jure civili . . . vel honorario, vel extraordinario.'

[5] *Inst.* ii. 10 § 3, where it is said of the imperial testament 'hoc jus tripertitum esse', meaning its sources were threefold,

the continuation of the *jus praetorium* in the wider sense. The emperors, prior to Diocletian, were theoretically regarded as but higher magistrates, acting like the consuls and praetors of the Republic. It has been suggested that the passage of Ulpian may possibly be a Tribonianism,[1] but there is, I submit, no ground for this. On the contrary, the very fact that we have a tripartite classification makes it in my judgement all the more probable that there is no interpolation.

(*i*) In Ulpian's *Book of Rules* it is said, 'Actionum autem quaedam ex contractu, quaedam ex facto, quaedam in factum sunt.' This most illogical division has much exercised the commentators, many of whom are disposed to trace in it the interpolating hand of Tribonian. But it is not worse than several of the Ulpianic trichotomies above considered. As explained in the *Digest* text, it places actions *in factum conceptae* as a species along with actions based on contract and delict.[2] But actions *in jus* are the proper

[1] Mitteis, *Privatrecht*, p. 39 n[1]. Mitteis also observes, 'Es ist möglich dass diese nachklassische Eintheilung an die Trichotomie actio, petitio und persecutio in unklarer Weise angeknüpft hat.'

[2] *Dig.* xliv. 7, 25 § 1. In fr. 42 § 1 *h. t.* Ulpian makes a similar tripartite division which is almost equally open to objection—'qui aliquam actionem vel civilem habent . . . vel honorariam actionem, vel in factum.'

antithesis, as Gaius makes clear, of actions *in factum conceptae*. The text has been discussed at length by Erman,[1] with characteristic ability, and he arrives at the conclusion that the classification at least is due to Ulpian. He says, with reference to the arguments for interpolation by the *Digest* compilers, 'Wir können also die, übrigens durch nichts beglaubigte, Möglichkeit einer so tiefgreifenden Umarbeitung von Ulpian's Regulae für unsere Stelle als durchaus unwahrscheinlich bezeichnen und Ulpian's Autorschaft als sicher.'[2] He subsequently to some extent departs from this as regards the text as a whole, but, if I understand him aright, he adheres to his view that the trichotomy is Ulpian's.[3] In any case I hold, in accordance with my thesis, that it is undoubtedly his.

There are numerous other tripartite divisions in the texts, to which one might refer as resting on no rational basis and creative of embarrassment by their inappropriateness or illogicality.

[1] *Ztsch. d. Sav.-Stift.* xix, pp. 299; but cf. xxiii, pp. 447–9. Erman describes Ulpian's use of the expression *ex facto* for the usual *ex delicto* or *ex maleficio* as a 'Wortspiel'.

[2] *Ztsch. d. Sav.-Stift.* xix, p. 301.

[3] Ibid. xxiii, pp. 447–9. There is the greatest probability that the last sentence of fr. 25 § 1 has been altered by the compilers.

But enough illustrations have probably been given.[1]

Are then these constantly recurring categories of three, which as we have seen are but rarely logical or natural, explicable on no general hypo-

[1] The following may be considered: Tripartite division of (1) praetorian stipulations by Ulp. in *ig.* xlvi. 5. 1 pr. See explanation by Puchta (*Inst.* ii. 268 i.) with note by Rudorff. In Van Leeuwen's edition of the *Corpus Juris, h. l.*, it is remarked—'Species recte dixit. Puritas enim, dies, conditio, formae sunt stipulationum, non species.' (2) 'tribus modis insula in flumine fit' in *Dig.* xli. 1. 30 § 2; (3) *atrox injuria* is *ex facto, ex loco, ex persona* in Gai. iii § 225, cf. Paul, *Sent.* v. 4 § 10 and *Dig.* xlvii. 10. 7, 8: *locus vulneris* is added to them in *Dig.* fr. 8 *h. t.*, *Inst.* iv. 4 § 9. (4) 'Edi autem est vel dictare, vel tradere libellum vel codicem proferre'—Ulp. in *Dig.* ii. 13. 6 § 7. (5) *Urere, frangere,* and *rumpere* in the *Lex Aquilia* which necessitated an extension to *corrumpere*; (6) 'Inpensarum species sunt tres' in Ulp. *Reg.* vi § 14; cf. Paul in *Dig.* l. 16. 79; (7) of obligations it is said (*Dig.* l. 16, fr. 19) that *quaedam agantur, quaedam gerantur, quaedam contrahantur.* This last is attributed by Ulpian to Labeo's *Commentary on the Edict* and as explained in the *Digest* is quite illogical and indefinite. See Otto, *Thesaurus,* i. 672, ii. 403; Voigt, *Röm. R.-G.* ii. 853. (8) *Pulsare, verberare, vi domum introire* in the lex Cornelia *de injuriis. Dig.* xxxxvii. 10, 5 pr. See *Rhetor. ad Herenn.* iv. 25, 35, and Girard in *Mélanges Gérardin,* p. 258. (9) Three kinds of *receptum,* viz. *arbitri, nautarum cauponum stabulariorum,* and *argentariorum.* See Lenel, *Ed. Perpet,* §§ 48-50. (10) 'Munus tribus modis dicitur'—*Dig.* l. 16, 18; 'Tres fere causae sunt ex quibus in possessionem mitti solent'—*Dig.* xlii. 4, 1. There are also *aliae divisiones trifariae innumerabiles.*

thesis? Commentators on the Roman law have for the most part contented themselves with remarking on this or that classification that it is strange or inexplicable or a playing with words, or heaping-up of terms,[1] or else sometimes they have given the most far-fetched and unsatisfactory explanations, as we have seen in relation to the trichotomies of *jus naturale, gentium*, and *civile*, and *jus personarum, rerum*, and *actionum*. But are they not all attributable to a tendency of the jurists (especially of Ulpian), more or less conscious, to adopt traditional symbolic tripartite divisions (whether handed down from remote times or invented in the later philosophic schools), or, influenced by tradition, to invent them? I have a conviction that they are due to each of these causes. There is nothing improbable in this. I have shown that the tendency to choose *tripertita* was inherent in Roman thinking about law from very early times. I have also indicated here and there that this tendency was increased by the influence of the philosophic schools. The tendency is, I think, to be largely found among non-juristic writings of the late Republic and early Empire. In the writings of the philosophers, both prior to and during the period of classical jurisprudence,

[1] See *supra*, p. 60.

especially of the Stoics and the Neo-Platonists, but even to some extent of the Peripatetic School, abundant evidence of proneness to *trifariae divisiones* exists. It undoubtedly appears in the writings of Cicero, who, though he cannot strictly be described as an adherent of any of these Schools, was, in his later years at least, much influenced by Stoicism.[1] Thus in the *Topics* he considers the division of law in general (*jus*) into 'legem, morem, aequitatem',[2] and he subsequently, with apparent inconsistency, says of *aequitas*, 'institutio aequitatis tripertita est, una pars legitima est, altera conveniens, tertia moris vetustate firmata. Atque etiam rursus aequitas tripertita dicitur esse: una ad superos Deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia justitia aut aequitas nominatur.'[3]

Pernice, in commenting on the first sentence of this passage, of which the meaning is, to my mind (as it probably was to that of Cicero),

[1] Cicero is usually described as an Academic.

[2] *Top.* § 31. Cf. *de Invent.* ii. 22 §§ 65 sq. and 53 §§ 161 sq., where the sources of law are *natura, consuetudo, lex.*

[3] *Top.* § 90. Cf. ibid. § 28, where *aequitas* has a different meaning. The *Topica* is a work based on Aristotelianism, and therefore the influence of symbolism on it, and particularly of the number 3, is not on the whole very great. See *supra*, p. 7, n.[2].

wholly vague, suspects it to be due to Greek influence and refers to Aristotle (*Rhet.* i. 13).[1] Other illustrations of this kind of trichotomy, most probably borrowed from the Greek philosophers, will be found in most of Cicero's writings, other than his letters and orations, in immense abundance.[2] It would, of course, be too much to charge Cicero, who, as I said, was not an adherent of any of the Schools, with being consciously dominated by the influence of trichotomies. All that can be said is that he shows a strange partiality for them. Take, for instance, the *Ad Brutum Orator*. A great part of the scheme of the book rests on *trifariae divisiones*. Thus the perfect orator is he who has these 'tria dicendi genera' in his power, viz. 'humilia subtiliter, modica temperate, magna graviter dicere.'[3] Then he

[1] *Ztschr. d. Sav.-Stift.* xxii, p. 62, note [1]. It is to be regretted that no attempt has hitherto been made to examine the *trifariae* divisions of Cicero, to trace their source and to estimate their value. I commend the subject to our younger scholars.

[2] See e. g. Cic. *de Nat. Deor.* ii. 30. 75; *de Off.* i. 3. 10 and ii. 9. 31; *de Orat.* i § 48. Even the orations are not wholly free from the charge. See e. g. *pro Murena* § 9, with which cf. *de Orat.* l. c. The comparison of these two last-cited passages, in so far as they characterize the functions of a jurist, is instructive.

[3] Cic. *Orat. ad Brut.* §§ 20, 100; cf. *Rhetor. ad Herenn.* iv. 8–11 'Sunt igitur tria genera, quae genera nos figuras

points out that there are three things that must be looked to by the orator, viz. 'quid, quo loco, et quomodo dicat,' of which the first depends on *inventio*, the second on *dispositio*, and the third on *elocutio*.[1] Then he makes a tripartite division (*tripartita varietas*) of the objects of perfect eloquence, viz. 'ad probandum, delectandum, flectendum,'[2] and then further treating of the 'forma et character orationis', he makes the 'collocatio verborum in eloquentia' of three different kinds.[3]

Leaving Cicero I will take Seneca. Seneca was an out-and-out Stoic,[4] and supplies us with good illustrations of the habit I am discussing. Thus, in the Second Book of his *Naturales*

appellamus, in quibus omnis oratio non vitiosa consumitur; unam gravem, alteram mediocrem, tertiam extenuatam vocamus.'

[1] *Orat. ad Brut.* §§ 43–57. Despite his *tripartite* division (§ 43) Cicero, ignoring it, actually makes four parts, §§ 54, 55. Cf. *de Off.* i. 3. 10.

[2] Ibid. § 69.

[3] Ibid. §§ 149, 175; cf. *Rhetor. ad Herenn.* iv. 12 sq., 27. Other trichotomies that I have noticed in the *Rhetor.* are i. 8. 12 ('narrationum tria sunt genera', &c.); i. 9. 14 ('tres res convenit habere narrationem', &c.); i. 11. 18 ('constitutiones itaque . . . tres sunt conjecturalis, legitima, juridicialis'); i. 2. 2; iv. 25. 35 (cf. ii. 26, 41).

[4] On Seneca's relation to Stoicism see Dill, *Roman Society from Nero to M. Aurelius*, pp. 306–9, and authorities there cited.

Quaestiones, he deals with a topic which readily lends itself to divisions and subdivisions. He professes to treat of lightning and thunder, and he begins (§ 1) by saying of the universe, 'Omnis de universo quaestio in coelestia, sublimia, terrena dividitur' (meaning astronomy, meteorology, and geography), and he then proceeds to make, in his subsequent chapters, almost every classification of his subject-matter tripartite. This may be seen, for instance, in sections 10, 12, 33, 39, 40, 47, 50. Probably all of them are traditional. Once or twice he expresses himself as dubious about the propriety of a particular division, but not with much confidence.[1] Most, if not all, of the trichotomies are in any view open to criticism as strained and unscientific.[2]

Another writer whose writings seem to show the influence of the *ternarius numerus*, both as regards words and ideas, is Apuleius. As is well known, he was a Phoenician who flourished during the reigns of Antonius Pius and Marcus Aurelius, and was thoroughly imbued with the current ideas of philosophy both of Greece (where

[1] See especially *Nat. Quaest.* ii. 39, 47, 48.

[2] See also Seneca, *Epist.* 75, 9–15, where he says of 'proficientes in philosophia et studio sapientiae' that 'in tres partes, ut quibusdam placet, dividuntur', &c.

he studied as a young man) and of Rome, and borrowed from his predecessors freely.[1]

It is needless to insist here upon the influence exercised upon the jurists by the Stoic School (not to speak of other schools) of philosophy; it has been often and abundantly discussed.[2] Such philosophers as Panaetius and Posidonius were especially influential. At the present day lawyers are not much influenced, either in theory or practice, by the doctrines of psychology or metaphysics. On the contrary, they as a rule regard abstract speculation in relation to law with suspicion if not dislike. We are living in an age of intense commercial competition, both individual and in-

[1] The following passages may be referred to: Apul. *de dogm. Plat.* i. 584 ('deorum trinas species'), i. 591, ii. 597 ('tria genera ingeniorum'), 606 ('justitiam vero, quod trinis animae regionibus sparsa sit'), iii. 638; *de Deo Socrat.* 664, 684; *de Mundo*, 755 ('tria fata sunt'); *Apolog.* 461, 484; Florid. *ad init.*; *Metam.* iii. 55, iv. 82.

[2] Several illustrations of this have been given in the preceding pages. See also *Dig.* l. 16. 124, attributed by *Cujas* (viii, p. 622) to the Stoics, and *Dig.* xli. 3. 30, where the influence of Stoic principles of realism on the division of things and the law of *usucapio* is well shown in the *tripartite* division given by Pomponius. Cf. Seneca, *Epist.* 102. 6; Sokolowski, *Philosophie im Privatrecht*, i, pp. 48 sq. and 119. Pomponius's three illustrations of *corpus ex distantibus*, viz. *grex*, *populus*, *legio*, may be compared with Seneca's *exercitus*, *populus*, *senatus*, which Sokolowski apparently overlooks (p. 119, l. c.).

ternational, and empirical rules of practical convenience govern the development of the law. But far otherwise was it at the close of the Roman Republic and the early period of the Empire. *Graecia capta*, having no longer any national life and few commercial interests, exerted her still keen intellectual forces in the fields of philosophy and speculation. And with these she dominated the Roman intellect not only in art and philosophy but to a large extent in jurisprudence, which, after the establishment of the *pax Romana* under Augustus, became the favourite study of the Romans and the securest avenue to fame. That Ulpian and Paul, among others, did not escape this influence is not open to doubt.[1] Savigny, in dealing with the tripartite division of pupils into *infantes*, *infantiae proximi* and *pubertati proximi* (see *Inst.* iii. 19 §§ 9, 10), the *infantes* being those who have not completed seven years, makes the

[1] On the influence of the schools of philosophy generally on the jurists see Pernice, *Labeo*, i, pp. 30 sq.; Voigt, *Jus Naturale*, &c. i, pp. 250 sq. On their influence on the doctrines of property and possession in particular, see Sokolowski, *Philosophie im Privatrecht*, vols. i and ii. Puchta (*Inst.* § 102) seems to quite underestimate the Stoic influence, though before his time there was perhaps a tendency to exaggerate it. Marcus Aurelius subsidised chairs at Athens for the four principal schools — Platonists, Peripatetics, Stoics, and Epicureans. *Dio Cass.* lxxxi. 31.

following observations: 'Nun wurde den Römern eine uralte Lehre griechischer Philosophie bekannt, welche der Zahl Sieben geheimnissvolle Kräfte, und den siebenjährigen Lebensperioden eine besondere Wichtigkeit beilegte. Diese Lehre kam jenem praktischen Bedürfniss auf die willkommenste Weise entgegen, und so geschah es, dass die Gränze der Kindheit gerade auf das Ende des siebenten Jahres allgemein angesetzt wurde, anstatt dass wohl auch Sechs oder Acht Jahre dafür angenommen werden konnten.'[1]

On the influence of Greek speculations generally on the jurists of the early Empire, Sokolowski, with much truth and cogency in my opinion, remarks: 'Sicher ist der elementare, produktive Rechtsinstinkt in der Kaiserzeit gesunken, zugleich aber unter dem Einfluss der griechischen Geistesbildung die Neigung für allgemeine Spekulationen ganz bedeutend gestiegen. Das Recht tritt aus dem Gebiet der praktischen Bedürfnissbefriedigung eines politisch eminent geschulten Volks in die Welt wissenschaftlicher Gedanken. . . . Der griechische, spekulative Genius unter warf sich im zweiten und dritten Jahrhundert nach Christo das gesamte Geistes- und Sitten-

[1] *System*, iii, p. 32. See also Quinctil. i. 1, 18, and *Dig.* xxvi. 7, 1 § 2, commented on by Savigny (l. c.).

leben, er umspann die einfachen und elementaren Lehren Christi mit einer Fülle schon früher ausgereifter, philosophischer Gedanken, er durchdrang vielfach auch die schlichten, praktischen Rechtsbegriffe des alten Römertums.'[1]

The Greek Schools of Philosophy also exercised an undoubted influence upon the works of the early Christian writers, similar to what they exercised upon those of the jurists. From the influence of numbers, and of the number 3 in particular, they did not emancipate themselves. It will be found in the works of Augustine, Tertullian, and others.[2] Nor can it well be doubted that the tripartite divisions both of the Deity into Father, Son, and Holy Ghost and of man into body, soul, and spirit—the soul or psyche being further subdivided by Philo, following Aristotle, into three principles (nutritive, emotional, and

[1] *Philosophie im Privatrecht*, ii, p. 126.

[2] See Augustin. *Civ.* xi, c. 25 ('de tripertita totius philosophiae disciplina'), where he says: 'Tria sunt quae in uno quoque homine artifice spectantur . . . natura, doctrina, usus'; Augustin. *Epist. ad Januarium*, ii. 18. 33, where he says: 'Tenarius numerus in multis sacramentis maxime excellit.' Cf. Cassiodor. as cited by Teuffel, *Gesch. d. rom. Litt.* § 483, notes 6, 7, 9, 10, 11; Tertull. *de Baptismo, VI in fine*; Usener, *Rhein. Mus. f. Phil.* lviii, pp. 41 sq. Curious illustrations of the mystic value of the number 3 in theological writings are given by Hugo de Palma, *Theologia Mystica*, ed. de Montes, Amsterdam, 1647.

rational)[1]—were due to that influence.[2] Many other illustrations might easily be given.[3]

It may be objected to the foregoing thesis that tripartite classifications of subjects are in themselves natural and convenient and very common (the latter part of the proposition no one who has been accustomed to listen to sermons will dispute), and that there are in the Roman texts many duads and quadrads and other classifications, of which fact also there is abundant evidence. In every system of law, moreover, including our own, there are plenty of tripartite divisions.[4] They assist the memory and are thus an aid to composition. Such objectors must then,

[1] *Eth. Nic.* i. 13.

[2] Cf. Plato's division of man's nature into intellectual, appetitive, and passionate (τὸ θυμοειδές), which however is perhaps a natural consequence of his view of his subject-matter. To what confusion of thought and extent of controversy the trichotomy of body, soul, and spirit may lead, see J. B. Heard, *Tripartite Nature of Man*, Edinburgh, 1870.

[3] On the Pauline triad of virtues—Faith, Hope and Charity—see Lobeck, *Aglaophanus*, p. 888 note; Epist. St. John, i. 7, 8.

[4] Some of them traditional and illogical, e. g. in English law the old divisions of *Crimes* into (1) treasons, (2) felonies, and (3) misdemeanours (treason being just a felony, though with special rules of procedure), and of *Contracts* into (1) contracts of record, (2) contracts by specialty, and (3) simple contracts. See Broom, *Com. Law*, 9th ed., pp. 255–6; Blackstone, *Commentaries*, ii, p. 465; Kenny, *Outlines of*

however, hold that the Roman trichotomies above criticized are either defensible in themselves on grounds of simplicity, convenience, logic, or the like, or that they were made casually, not to say 'perperam et sine ratione'. But this I have shown cannot be maintained. Nor can it be disputed that the traditional dominance of the number 3 was potent at the time of the classical jurists. It is not necessary for me to hold, nor, as I have said, do I hold, that all the various trichotomies of Paul, Ulpian, and others that I have given were deliberately invented by them under the influence of symbolism or the traditional force of numbers. On the contrary it is almost certain that many of them were tralatitious, and it is probable that when the jurists ventured to make divisions of their own they were often less illogical.[1] Gaius, at least, who was not apparently much influenced by Stoic or other philosophy, seems entitled to this credit. And the same credit may doubtless be given to some other jurists. But Ulpian and Paul cannot be acquitted in my opinion of the charge of adopting, and to some extent inventing, more or less consciously, symbolic tripartite categories, with the

Criminal Law, p. 83; Stephen, *Hist. of Crim. Law*, ii, p. 187. Cf. Russell on *Crimes*, 6th ed., p. 192.

[1] See, e. g., Gai. iv § 1.

result of obscuring the subject and producing frequently fanciful and misleading doctrines.

Trichotomy, unlike dichotomy (e.g. A and not A), has no apparent universality. It depends on the subject-matter which is being discussed whether it can in any given case be justified. There is no principle in logic which should, for instance, lead to a given genus being divided into three species rather than any other number; the special subject-matter must in each case decide what the number of co-ordinate species should be.

If my theory be accepted, it will perhaps put an end to the vain attempts that have been made, and are still being made, by commentators on the Roman law to find reasons to justify classifications which their authors themselves could not have attempted to justify as logical or natural, and to which they, in fact, attached no practical importance. How much labour would have been saved, and may yet be saved, to jurists, philosophers, and theologians by a little attention to anthropological research!

Of course, nothing that I have said can materially detract from the merits of the Roman jurists—from their lucidity and logical acumen and power of philosophic analysis—to which all who have studied them must ever pay profound reverence.

It merely shows that classification and definition of legal doctrines and rules were not their strong points.[1] They were in fact in these matters the children of their age, and were unable to emancipate themselves from the traditional influences of their predecessors and of the schools of philosophy.

[1] Savigny, *System*, ii, Beilage vi, p. 508, observes: '... die allermeisten Definitionen der alten Juristen überaus mangelhaft sind.'

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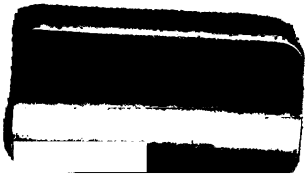
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